IN THE

Supreme Court of the United States

No. 66

OCTOBER TERM, 1950

ALFRED F. DOWD, AS WARDEN OF THE INDIANA STATE PRISON,

Petitioner,

vs.

UNITED STATES OF AMERICA, EX REL., LAWRENCE E. COOK,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR THE PETITIONER

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OPINION BELOW

The opinion of the Court of Appeals is set forth in full at page 203 through page 209 of the Transcript of the Record, and has been officially reported at page 212 of 180 Fed. (2d).

JURISDICTION

The judgment of the court of Appeals was entered February 7, 1950. (Record, p. 210.) Petition for Certiorari

was filed May 8, 1950, and was granted October 16, 1950. This Court's jurisdiction is based on 62 Stat. 928, Title 28 United States Code, Section 1254 (1).

QUESTIONS PRESENTED

1. Is a prisoner, temporarily prevented from taking an appeal, denied equal protection of the law? In other words, may a convicted prisoner, whose conviction and imprisonment is based on an unquestioned, valid judgment, obtain his freedom by habeas corpus, for the reason that prison officials temporarily denied him the right to appeal; or can the right be considered in a state of suspension during the period of disability and then restored when the disability is removed? Can the State remove the disability, and thereby restore the right to an appeal, and thus provide the prisoner with equal protection of the law?

2. If the right to an appeal can be considered in a state of suspension during the period of disability, thus preventing the running of the time limitation on appeals, does the time limitation begin to run at the time that the restraint is removed and the petitioner obtains knowledge of the removal of such restraint?

3. When a petition for late appeal (based on *questions of fact* as to whether or not a prisoner was prevented from taking an appeal) is presented to a State Supreme Court, and said Court denies said petition but is silent as to the basis for decision, can it not be presumed that the *questions of fact* were decided against the petitioner and have become res judicata; so that a Federal District Court

should not thereafter hear evidence and again determine these same *questions of fact* in habeas corpus proceedings?

4. Is a prisoner, who is imprisoned under an unquestioned, valid judgment of a State Court, entitled to the extraordinary remedy of complete freedom in habeas corpus proceedings in a Federal Court, because of matters occurring subsequent to said judgment?

STATEMENT OF THE CASE

Respondent was adjudged guilty of murder on the 23rd day of July, 1931, by the Jennings Circuit Court, Jennings County, Indiana, and sentenced to the Indiana State Prison for life. (Record, p. 4.)

On October 22, 1948, respondent filed an amended petition for writ of habeas corpus in the United States District Court for the Northern District of Indiana, in which he alleged, in substance, that Warden Daly and other officers of the Indiana State Prison prevented him from sending appeal documents out of said prison within the six months period allowed by law to appeal; and that because of such restraint, the respondent was deprived of an opportunity to appeal his conviction to the Supreme Court of Indiana; and that the denial constituted a violation of equal protection of the law as guaranteed by the federal Constitution. (Record, pp. 20 to 27, inclusive.)

To respondent's petition, petitioner addressed a motion to dismiss in which petitioner asserted that the petition showed on its face various matters which precluded the respondent from a right to relief by habeas corpus. Also, in the motion to dismiss, the petitioner contended that all *questions of fact* concerning whether or not the acts of the

prison warden and other officials deprived the respondent of his right to appeal, were decided adversely to the respondent by the Supreme Court of the State of Indiana, and that the whole matter is res judicata. (Record, p. 28.)

The District Court overruled the motion to dismiss and after a hearing came to the conclusion that the respondent's allegations were true, and that he had been prevented from sending out appeal papers. The court believed that, because of said facts, the respondent's further imprisonment was illegal. For this reason, and on the authority of *Cochran v. Kansas* (1942), 316 U. S. 255, 86 L. Ed. 1453, 62 S. Ct. 1068, the District Court ordered that Cook be discharged. (Record, pp. 178 to 183, inclusive.)

Petitioner appealed to the United States Court of Appeals for the Seventh Circuit; after oral argument, that court (by a two to one decision) affirmed the judgment of the District Court and rendered its opinion on February 7, 1950. Judge Kerner dissented. (Record, pp. 203 to 210, inclusive.)

Of the judgment rendered by the Circuit Court of Appeals, the petitioner, Alfred F. Dowd, requested a review by this Honorable Court on writ of certiorari.

ASSIGNED ERRORS

The Circuit Court of Appeals by affirming the judgment of the Federal District Court erroneously decided the four questions presented herein. (This brief, p. 2.)

SUMMARY OF ARGUMENT

1. The first question presented was answered in the affirmative by the decision of the Federal District Court and the Circuit Court of Appeals. The decision decided that where an appeal is temporarily denied, the right to appeal is not suspended; the effect of denial is permanent and the State is forever precluded from restoring the right. We believe that this decision constitutes a misapplication of the equal protection clause of the federal Constitution. The respondent's allegations were to the effect that he was prevented for a period of time from sending out his appeal papers and that this disability commenced immediately after his incarceration in 1931. The record discloses that the disability (if any) was removed not later than 1933. That the respondent knew of this removal of disability is apparent from the record of testimony and from the fact that he prepared and filed a coram nobis petition in the original trial court in 1937. If the respondent was prevented from sending out appeal papers, the statutory time for perfecting an appeal admittedly would not run during the entire period of disability. In other words, equal protection of the law was not denied to him but was suspended during this period. When the warden removed the disability, the right to an appeal was restored to petitioner and the statutory time for taking an appeal began to run. Petitioner failed to appeal during said statutory period, and consequently waived his right to do so.

2. The effect of the decision of the Federal District Court, as affirmed by the Circuit Court of Appeals, is to grant an unlimited time for taking an appeal to any prisoner finding himself in the same situation as this respondent. This is in direct contravention of the statutes of Indiana governing jurisdiction of appeals. Instead of

receiving equal protection of law, as guaranteed by the Fourteenth Amendment, this respondent, and others similarly situated, receive special consideration and favored treatment. Such favor is in effect a grant of freedom. Witnesses scatter and die; records are destroyed; a second conviction becomes impossible. The very purpose of a statute limiting the time for an appeal is defeated.

3. The third question presented was decided in the negative by the decision of the Federal District Court and by the Circuit Court of Appeals. We believe that the Federal District Court in hearing evidence, and determining the same *questions of fact* as were presented to the Indiana Supreme Court, exercised an appellate function and reviewed and reversed a decision of the Indiana Supreme Court. We concede that the Federal District Court would not be bound by a determination by the Indiana Supreme Court of a question as to whether or not certain facts constitute a violation of a Federal Constitutional right. A determination of this legal question by the Indiana Supreme Court would not constitute res judicata of the particular question so as to preclude a Federal District Court from determining the same *legal* question. However, in the instant case it is conceded that the facts, if true, would constitute a violation of a federal constitutional right. The issue which was presented to the Indiana Supreme Court for its determination was one of fact. The respondent's allegations were denied by the State and a hearing by affidavit was held to determine the truth or falsity of the allegations. After receiving evidence by both parties, the Indiana Supreme Court denied the respondent's petition. This judgment of the Indiana Supreme Court constituted a determination of a factual question and not a legal question. We strongly contend that this decision of the Indiana Supreme Court should constitute

res judicata on the questions of fact raised and the Federal District Court should not have assumed jurisdiction and heard evidence, and substituted its judgment for that of the Indiana Supreme Court by making a finding on the exact same questions of fact.

4. The fourth question presented was answered in the affirmative by the decision of the Federal District Court and the Circuit Court of Appeals. Judge Kerner based his dissent on this question. He stated that under the circumstances of this case respondent is not entitled to the extraordinary remedy of complete freedom by habeas corpus.

Respondent was tried and convicted of murder. In the trial he was represented by two attorneys of his own choosing. Respondent had a jury trial and the court heard respondent and other witnesses. After his conviction, respondent's attorneys prepared and filed a motion for new trial, which was overruled by the trial court.

In his petition for a writ of habeas corpus addressed to the Federal District Court, the petitioner made no attack upon the validity of the judgment convicting him of murder. His allegations concerned matters which occurred subsequent to the judgment. If the respondent had been successful in persuading the Indiana Supreme Court that the facts alleged by him were true, he would have been afforded the remedy of an appeal. However, the Federal District Court after assuming jurisdiction, hearing evidence, and deciding that the respondent's allegations were true, could afford the respondent only one remedy, and that was the extraordinary remedy of complete freedom from an unquestioned, valid judgment of conviction. We believe that under the circumstances of this case the Federal District Court should not have assumed jurisdiction when the only

remedy it could afford was so extraordinary. By the "circumstances of this case" we mean: (A) the Indiana Supreme Court had already had the same issues of fact before them and rendered a decision adversed to the respondent; (B) even if the alleged facts were true and resulted in a violation of the equal protection clause of the constitution, said violation was only temporary, and equal protection was subsequently restored.

ARGUMENT

I. The following argument is based on the first of four questions presented herein.

Assuming, but not conceding, that prison officials under Warden Daly prevented the respondent from sending out appeal papers during 1931 and 1932, the respondent was not denied equal protection of the law as claimed by him. The record in this case discloses that the respondent was imprisoned in 1931 (Record, p. 4), and that Warden Daly's tenure as warden expired in June, 1933. (Record, p. 35.) Mr. Kunkel served as warden from June, 1933, to May, 1938. (Record, p. 158.) The record further discloses that in 1933 Warden Kunkel called a meeting which was attended by all inmates of the prison except those who were ill or insane and promulgated the rule that any prisoner who desired to do so could send any writing to any court or any lawyer as a special letter at any time. (Record, pp. 157, 158.) There is no contention and no evidence whatsoever of any restriction on the sending of papers to courts or to lawyers from the time of Warden Kunkel's meeting in 1933 until the present date.

While it is true that the respondent testified that he did not attend Warden Kunkel's meeting, he did state that he learned of the rule promulgated at said meeting. Respondent testified that he learned that Mr. Kunkel permitted papers to go out. (Record, p. 85.)

Cook's sister, Florence Cook, called on his behalf, testified on cross-examination that Cook wrote to her in 1933; that he could prepare papers; and that he then began preparing the evidence; that some of the affidavits used when the petition for error coram nobis was filed in 1937 were

signed in 1934; that they took some years to get the things ready; and that they had the assistance, at different times, of several attorneys. (Record, p. 58.)

It is also to be noted that the respondent must have been aware that he was not restricted from sending out papers, because the record shows that Cook did prepare and mail a coram nobis petition as early as October, 1937. (Record, p. 204.)

We believe that the respondent was not denied equal protection of the law. The right to appeal is not a constitutional right, but a statutory one. Since appeal is a statutory right, all are entitled to it, and to deprive anyone of the right would constitute a denial of equal protection of the law. In the instant case even if Cook was prevented from 1931 to 1933 from sending out appeal papers he was not denied equal protection of the law. This is true because, if he was so prevented, the time limitation for taking an appeal would not be running against him during the entire time he was under this disability.

However, the restriction if it did exist, was removed and Cook was then no longer under disability. The time limitation for taking an appeal at that time was six months. This six months' period started to run either on the day that Warden Kunkel removed the alleged restriction (in 1933) or when Cook first had knowledge that the restriction was removed. When the time did start to run Cook was entitled to a six months' period in which to seek an appeal, the exact time allowed to every other convicted prisoner. Whether this time started to run when Warden Kunkel lifted the restriction or when Cook first had knowledge of that fact, is immaterial. The six months' period, computed from the time Kunkel lifted the restriction, expired some time in 1934. Cook made no attempt to appeal during

that time. We do not know the exact date when Cook first became aware of the fact that the alleged restriction was removed and that he was no longer under disability, if he ever was, but we do know that the respondent prepared and sent out a petition for writ of error coram nobis in October, 1937. Therefore, he knew at that time that he was under no disability. If the time is computed from October, 1937, the time for appeal would have expired in 1938, and Cook made no attempt to take any appeal until 1946.

If Cook was under a disability, the time for taking an appeal would begin to run on the day that said disability was removed or knowledge of the removal came to be known to him. On that day Cook would occupy the same status relative to appeals, as a prisoner who was convicted on that same day; each would have exactly six months in which to take an appeal. It is a matter of common knowledge that most prisoners do not appeal from their convictions; when they do not appeal within the time provided for so doing they waive their right to do so.

The protection of constitutional rights both Federal and State may be waived by an accused, so long as the waiver is not against public policy.

Adams v. United States ex rel. McCann (1942), 317 U. S. 269, 275, 87 L. Ed. 268, 63 S. Ct. 236;
Schick v. United States (1904), 195 U. S. 65, 72, 49 L. Ed. 99, 24 S. Ct. 826;
Brown v. State (1941), 219 Ind. 251, 261, 37 N. E. (2d) 73.

Assuming that the State prevented Cook from taking an appeal, the prevention does not constitute a denial of equal protection of the law because the right to appeal was subsequently restored. The State of Indiana, assuming that

Cook was restrained, did no more than temporarily *suspend* Cook's right to appeal. However, his right was restored to him and respondent was permitted a full six months' period in which to perfect an appeal; a period of time equal to that afforded any other prisoner, and Cook, by not seeking an appeal, waived his right to do so.

II. The following argument is based on the second of the four questions presented herein.

The decision of the Federal District Court and the Court of Appeals has the effect of informing the State of Indiana that it owed Cook the opportunity to perfect an appeal, and that the temporary failure to allow the appeal resulted in a permanent denial of equal protection under the Constitution. If this were so, the respondent would have considerably more than equal protection of the law; he would be in a particular position of favor.

The effect of this decision is to grant the respondent and others similarly situated, unlimited time for taking an appeal; while all other prisoners must appeal within a certain limited time, or they are deemed to have waived their right to do so. This effect permits prisoners in respondent's situation to wait until witnesses have died and evidence has been destroyed before taking their appeal. Such favored treatment is tantamount to a grant of freedom, because in most criminal cases, witnesses scatter, memory dims, and evidence disappears after a lapse of many years. A conviction on a retrial under such circumstances is in most cases a practical impossibility. The very purpose of a statute which limits the time for taking appeals is defeated by this decision.

III. The following argument is based on the third of the four questions presented herein.

The questions of fact presented by the respondent, to the Federal District Court, in his petition for habeas corpus, are the exact questions which the respondent presented fo the Indiana Supreme Court for its determination. (Record, p. 117 et seq.) The Indiana Supreme Court heard the evidence by affidavits submitted by the respondent and by the State. Without rendering a written opinion concerning these questions, the Court denied the respondent's petition. Thereafter, the respondent petitioned for a rehearing in which he again presented these same questions, and the Indiana Supreme Court denied the petition for rehearing. (Record, page 134 et seq.) We believe that the Supreme Court of Indiana considered and adjudicated the merits of respondent's contentions which were fully set forth in his petition, and that the Indiana Supreme Court by denying his petition determined that the allegations thereof were untrue. This constitutes a determination of questions of fact and should, as to the facts determined, be res judicata. A petition for writ of certiorari was filed in this Court by the respondent, and said petition was denied. (*Cook v. State* (1947), 330 U. S. 841, 91 L. Ed. 1287, 67 S. Ct. 981.)

Since the Indiana Supreme Court has considered and adjudicated the merits of respondent's contentions, and this Court has declined to accept certiorari, a Federal Court should not reexamine these questions of fact in habeas corpus proceedings. This court has held that, where the state courts have considered and adjudicated the merits of a petitioner's contentions, and the United States Supreme Court has either reviewed or declined to review the decision of the State Court, a federal court will ordinarily not

reexamined, upon a writ of habeas corpus, the questions thus adjudicated.

Ex parte Hawk (1944), 321 U. S. 114, 118, 88 L. Ed. 572, 64 S. Ct. 448;
Salinger v. Loisel (1924), 265 U. S. 224, 230, 232, 68 L. Ed. 989, 44 S. Ct. 519;
White v. Ragen (1945), 324 U. S. 760, 764, 89 L. Ed. 1348, 65 S. Ct. 978.

By assuming jurisdiction and determining the case, under the circumstances of this record, the District Court actually reviewed the case decided by the Indiana Supreme Court, as though the respondent had appealed.

The respondent concedes that a Federal District Court has the right to hear a case to determine if a Federal Constitutional right has been violated, and the Court has this right regardless of whether or not a state court has already adjudicated the same issue.

Knewel v. Egan (1925), 268 U. S. 442, 445, 69 L. Ed. 1036, 45 S. Ct. 522;
Collins v. Johnston (1915), 237 U. S. 502, 505, 59 L. Ed. 1071, 35 S. Ct. 649;
Frank v. Mangum (1915), 237 U. S. 309, 59 L. Ed. 969, 35 S. Ct. 582.

However, we believe that this right of the Court extends only to a determination of a legal question as to what constitutes a violation of a Federal Constitutional right.

It has been held by this Court in such a case that, although the legal doctrine of res judicata does not apply, so as to deny consideration by the federal district court in a habeas corpus proceeding; where a ruling of state court

on a federal constitutional question is being examined by the federal district court, the decision of the state court cannot be ignored or disregarded.

Frank v. Mangum (1915), 237 U. S. 309, 59 L. Ed. 969, 35 S. Ct. 582.

To illustrate the above, we believe that in a case where the state court admits that a prisoner's factual allegations are true, but holds that said facts (even though true) do not constitute a violation of a Federal Constitutional right, a Federal Court would have the right to make its own determination as to whether or not the admitted facts did constitute a violation of a Federal Constitutional right. The question then would be simply a legal one and the prior state court's determination would not render said question res judicata.

However, in a case where the state court admits that the facts of a prisoner's allegations, if true, constitute a violation of a Federal Constitutional right and then accepts jurisdiction to hear the facts, and determines that the facts are not true, a Federal Court should not be permitted to exercise jurisdiction to hear the same evidence and determine whether or not in its opinion said facts are true. The trial of the facts by a state court of competent jurisdiction should constitute a final determination of the truth or lack of truth of a prisoner's allegation and the factual questions decided should then be res judicata.

In the instant case it is admitted that the facts as alleged by Cook would, if true, constitute a violation of the equal protection clause of the federal Constitution.

Cook previously presented the same factual questions as were presented in the Federal District Court to the

Indiana Supreme Court in a petition for a delayed appeal. (Record, p. 117.) The Court ordered the case heard by affidavit; the petitioner submitted affidavits in support of his allegations and the Attorney General of Indiana submitted affidavits in opposition to said allegations. The Court denied Cook's petition without rendering a written opinion thereon. (Record, p. 173.) The respondent sought to have this decision of the Indiana Supreme Court reviewed by this Court on a writ of certiorari. This Court denied certiorari and at the same time denied an application by the petitioner for a writ of habeas corpus.

Cook v. State of Indiana (1947), 330 U. S. 841, 91 L. Ed. 1287, 67 S. Ct. 977.

Since it is admitted that the allegations, if true, would constitute a violation of a Federal Constitutional right, and the Indiana Supreme Court heard evidence as to the truth or falsity of the allegation and then denied Cook's petition, it can be concluded that the Indiana Supreme Court decided that the facts as alleged by Cook were untrue. As stated before we believe that a determination of *a factual question* by a state court of competent jurisdiction should constitute res judicata on the issue as to whether or not said facts are true. The Federal District Court should not have heard evidence upon and determined the exact same factual questions as were determined by the Indiana Supreme Court.

It is to be noted that the case of *Cochran v. Kansas* (1942), 316 U. S. 244, which was relied on by the Federal District Court and the Circuit Court of Appeals, is clearly distinguishable from the instant case. In the Cochran case the same general allegations concerning conduct by prison officials in preventing an appeal by a prisoner were made.

However, in that case the Attorney General of Kansas defended on a technical interpretation of the word "record". Cochran's allegations (which were substantially the same as Cook's) were not denied by the Attorney General and no direct evidence or affidavits were submitted in opposition. In other words, in the Cochran case the allegations were never put at issue and no hearing was ever had thereon. The case was before this Court on direct appeal from the Kansas Supreme Court and this Court remanded the case to the State of Kansas with instructions to hear and determine the questions of fact which were raised. In the instant case Cook's allegations were put at issue by a denial, a hearing by affidavits was had thereon, and a determination of the case made.

IV. The following argument is based on the fourth of four questions presented herein.

Judge Kerner dissented from the majority opinion of the Circuit Court of Appeals and in said dissent stated as follows:

> "I can not agree that a prisoner whose guilt was established by a regular verdict and who has made no contention that the judgment finding him guilty of murder was void, should escape punishment under the facts in this case."

The Federal District Court and the Court of Appeals relied on the case of *Cochran v. Kansas*, 316 U. S. 244, in deciding this question. It is believed that the Cochran case is not an authority applicable to this case. This Court received the Cochran case on a direct appeal from the Supreme Court of the State of Kansas, and after exercising its power of review, remanded the case back to the Kansas Supreme Court.

The instant case represents an entirely different situation. The Federal District Court is not a Court of review and had no authority to remand this case back to the Indiana Supreme Court. The Federal District Court has afforded the petitioner the extraordinary remedy of complete freedom in spite of the fact that there has been no contention by anyone concerned that respondent's conviction of murder was invalid in any respect.

An examination of the record shows that Cook testified that he had been represented by counsel and had had a jury trial; that during the trial he himself had testified and that witnesses had testified on his behalf (Record, pp. 78-79); and that his attorneys had submitted instructions and argument to the jury (Record, p. 92); and that his attorneys had filed a motion for new trial on his behalf (Record, p. 89).

It can be readily seen by the above that a factual determination by the Indiana Supreme Court in favor of Cook would have had a far different result from the same factual determination made by the Federal District Court. If the Indiana Supreme Court had decided that Cook's allegations were true and that he had not waived his right to an appeal, that court could have granted a delayed appeal. A determination of the facts in Cook's favor on appeal would not have resulted in complete freedom. The Federal District Court had no authority to grant a delayed appeal; and when it undertook to permit Cook to again present the same evidence which he had already presented to the Indiana Supreme Court, the Federal District Court, by determining the facts differently from the determination made by the Indiana Supreme Court was forced to give Cook his freedom. Under such circumstances the Federal District Court should never have accepted jurisdiction.

Even if the facts alleged in Cook's petition for habeas corpus were true and resulted in a violation of the equal protection clause of the federal Constitution, said violation was only temporary, and was subsequently restored. (This point was fully developed in paragraphs one and two of our Argument.) Under these circumstances, the respondent was not entitled to his freedom and the Federal District Court should have denied the respondent's application for writ of habeas corpus.

CONCLUSION

For each and all of the above reasons petitioner believes that the decision of the Federal District Court and of the Circuit Court of Appeals was erroneous and it is respectfully submitted that said decision should be reversed.

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